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HOUSE BILL NO. 1860

Offered January 11, 2017

Prefiled January 10, 2017

A *BILL to amend the Code of Virginia by adding in Chapter 3.1 of Title 62.1 an article numbered 9.1, consisting of sections numbered 62.1-44.34:9.1 through 62.1-44.34:9.9, relating to aboveground storage tanks; fund; civil and criminal penalties.*

Patron—Lopez

Referred to Committee on Agriculture, Chesapeake and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 3.1 of Title 62.1 an article numbered 9.1, consisting of sections numbered 62.1-44.34:9.1 through 62.1-44.34:9.9, as follows:

*Article 9.1.**Aboveground Storage Tanks.***§ 62.1-44.34:9.1. Definitions.**

As used in this article, unless the context requires a different meaning:

"Aboveground storage tank" means a tank or storage container that, including its associated pipes, has a storage capacity of 5,000 gallons or more and is used for storing a regulated substance at standard temperature and pressure and the volume of which, including the volume of the pipes, is more than 90 percent above the surface of the ground. "Aboveground storage tank" does not include (i) a tank used to contain at atmospheric pressure an accumulation of oil of any kind or in any form, including petroleum and petroleum by-products, fuel oil, lubricating oils, sludge, oil refuse, oil mixed with other wastes, crude oils, and all other liquid hydrocarbons regardless of specific gravity; (ii) a line pipe and breakout tank of an interstate pipeline regulated under the federal Hazardous Liquid Pipeline Safety Act of 1979 or the federal Natural Gas Pipeline Safety Act of 1968, as amended; (iii) a liquid trap, atmospheric or pressure vessel, or associated gathering lines related to oil or gas production and gathering operations; (iv) flow through process equipment used in processing or treating oil by physical, biological, or chemical means; (v) a shipping container that is subject to state or federal laws or regulations governing the transportation of hazardous materials, including a railroad freight car that is subject to federal regulation; (vi) a barge or boat subject to federal regulation under the U.S. Coast Guard, U.S. Department of Homeland Security, including federal regulations promulgated at 33 C.F.R. Chapter I, or subject to other federal law governing the transportation of hazardous materials; (vii) a swimming pool; (viii) a device containing surface water, groundwater, demineralized water, noncontact cooling water, drinking water for human or animal consumption, or water stored for fire or emergency purposes; (ix) a device containing food or food-grade materials used for human or animal consumption and regulated under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.); (x) except when located in a zone of critical concern as defined by regulations adopted by the Board, a device located on a farm, the contents of which are used exclusively for farm purposes and not for commercial distribution; (xi) a device holding wastewater that is being actively treated or processed, including a clarifier, chlorine contact chamber, or batch reactor; (xii) a tank that is empty and is held in inventory or offered for sale; or (xiii) a piece of electrical equipment, such as a transformer, circuit breaker, or voltage regulator transformer.

"Owner" means any person in control of, or having responsibility for, the daily operation of an aboveground storage tank for the storage, use, or dispensing of regulated substances. "Owner" does not include any person who, without participating in the management of an aboveground storage tank, holds indicia of ownership primarily to protect the holder's security interest in the aboveground storage tank.

"Person" means the same as that term is defined in § 62.1-44.34:8.

"Regulated substance" means an element, compound, mixture, solution, or substance that, when released into the environment, may present substantial danger to the public health or welfare or the environment. The term "regulated substance" includes any substance defined in § 101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, but not oil or any substance regulated as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act of 1976.

"Release" means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an aboveground storage tank into ground water, surface water, or upon lands, subsurface soils, or storm drain systems.

"Responsible person" means the same as that term is defined in § 62.1-44.34:8.

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HB1860

59 "Secondary containment" means a safeguard applied to one or more aboveground storage tanks that
60 prevents the release into the waters of the state of the entire capacity of the largest single tank and
61 sufficient freeboard to contain precipitation. To qualify as secondary containment, the barrier and
62 containment field shall be sufficiently impervious to contain fluids in the event of a release and may
63 include double-walled tanks, dikes, containment curbs, pits, or drainage trench enclosures that safely
64 confine the release from an aboveground storage tank in a facility catchment basin or holding pond.
65 Earthen dikes and similar containment structures shall be designed and constructed to contain, for a
66 minimum of 72 hours, fluid that escapes from an aboveground storage tank.

67 **§ 62.1-44.34:9.2. Powers and duties of Board regarding aboveground storage tanks.**

68 The Board shall carry out the provisions of this article and compatible provisions of federal acts and
69 is authorized to:

70 1. Exercise general supervision and control over aboveground storage tank activities in the
71 Commonwealth;

72 2. Provide technical assistance and advice concerning all aspects of aboveground storage tank
73 management;

74 3. Collect such data and information as may be necessary to conduct the state aboveground storage
75 tank program;

76 4. Apply for such federal funds as may become available under federal acts and transmit such funds
77 to appropriate persons;

78 5. Adopt regulations for aboveground storage tanks establishing (i) construction, performance, and
79 inspection standards; (ii) secondary containment requirements; (iii) registration requirements; (iv)
80 recordkeeping requirements; (v) leak detection requirements; (vi) release response plan requirements;
81 (vii) prohibitions against the release of any regulated substance from an aboveground storage tank; and
82 (viii) enforcement provisions;

83 6. In the event of a release of a regulated substance into the environment from an aboveground
84 storage tank, either (i) require the responsible person to undertake corrective action or (ii) undertake
85 corrective action if such action is necessary, in the judgment of the Board, to protect human health or
86 the environment;

87 7. Seek recovery of costs incurred, excluding moneys expended from the Aboveground Storage Tank
88 Fund pursuant to § 62.1-44.34:9.8, for undertaking corrective action or enforcement action with respect
89 to the release of a regulated substance from an aboveground storage tank;

90 8. Adopt regulations setting out a schedule of fees to cover the costs of enforcement, inspection,
91 compliance monitoring, and other costs associated with carrying out the provisions of this article. Any
92 registration fee shall be based on the size and type of the aboveground storage tank and shall be paid
93 at the time of registration or registration renewal; and

94 9. Adopt such regulations as may be necessary to carry out its powers and duties with regard to
95 aboveground storage tanks in accordance with applicable state and federal laws and regulations.

96 **§ 62.1-44.34:9.3. Registration, evaluation, and inspection of aboveground storage tanks.**

97 A. By December 31, 2018, the owner of each aboveground storage tank shall register the
98 aboveground storage tank with the Board and the local director of emergency management appointed
99 pursuant to § 44-146.19. Registration shall be renewed every five years or whenever the title to the
100 aboveground storage tank is transferred, whichever occurs first. Each registration shall specify the age,
101 size, type, location, and current use of each aboveground storage tank, its distance from the nearest
102 body of water, and any other details required by regulations adopted by the Board. The owner shall,
103 within 30 days after the upgrade, repair, replacement, or closure of an existing aboveground storage
104 tank or the installation of a new aboveground storage tank, notify the Board in writing of such upgrade,
105 repair, replacement, closure, or installation. The Board shall compile an inventory of aboveground
106 storage tanks in the Commonwealth.

107 B. Each aboveground storage tank and, if applicable, its associated secondary containment structure
108 shall be evaluated by a qualified licensed professional engineer, a qualified person working under the
109 direct supervision of a registered professional engineer, a person certified to perform aboveground
110 storage tank inspections by the American Petroleum Institute or STI/SPFA, or a person holding
111 certification under another program approved by the Director. Every owner shall submit a certification
112 that each aboveground storage tank and, if applicable, its associated secondary containment structure
113 have been evaluated by a qualified person and meet the standards established in regulations adopted by
114 the Board. The certification form shall be submitted to the Director by December 31, 2019. Subsequent
115 certifications shall be due at regular intervals thereafter as established by the Board, but not more
116 frequently than once per calendar year.

117 C. Any owner or operator of an aboveground storage tank shall, upon request of the Director or his
118 designee, furnish information relating to the aboveground storage tanks and their associated equipment
119 and contents; conduct reasonable monitoring or testing; permit the Director, at all reasonable times, to
120 inspect and copy records relating to aboveground storage tanks; and permit the Director to have access

to the aboveground storage tanks for corrective action. The Director or his designee may enter at any time any establishment or other place where an aboveground storage tank is located; inspect and obtain samples of any fluid contained in an aboveground storage tank; conduct monitoring or testing of the aboveground storage tanks, associated equipment, contents or surrounding soils, surface water, or groundwater; and take corrective action as specified in this article. Each inspection shall be commenced and completed with reasonable promptness.

§ 62.1-44.34:9.4. Release prohibited; aboveground storage tank safety.

A. The release of a regulated substance from an aboveground storage tank is prohibited.

B. The owner of any aboveground storage tank built before 1990 shall, by January 1, 2020, upgrade the aboveground storage tank to meet performance standards applicable to new aboveground storage tanks established by the Board pursuant to § 62.1-44.34:9.2.

C. The owner of any aboveground storage tank with a capacity of 25,000 gallons or more shall install and maintain a secondary containment infrastructure according to regulations adopted by the Board pursuant to § 62.1-44.34:9.2.

§ 62.1-44.34:9.5. Financial responsibility for aboveground storage tanks.

A. The Board shall adopt regulations requiring every owner of an aboveground storage tank to demonstrate financial responsibility sufficient to comply with the requirements of this article as a condition of operation of the aboveground storage tank. Regulations governing the amount of financial responsibility required shall take into consideration the type, storage capacity, and location of an aboveground storage tank, the risk of a release of a regulated substance from that type of aboveground storage tank in the Commonwealth, the potential damage or injury to lands or state waters or the impairment of their beneficial use that may result from a release from that type of aboveground storage tank, the potential cost of containment and cleanup from that type of aboveground storage tank, and the nature and degree of injury or interference with general health, welfare, and property that may result from a release from that type of aboveground storage tank. The Board may waive the financial responsibility requirement for an aboveground storage tank that, in the judgment of the Board, poses a de minimis risk to public health or the environment. In no instance shall any financial test of self-insurance require the owner of an aboveground storage tank to demonstrate more than \$1 of net worth for each dollar of required financial responsibility. If such net worth does not equal the required financial responsibility, then the owner shall demonstrate the minimum required amount by a combination of financial responsibility mechanisms in accordance with subsection B. No governmental agency shall be required to comply with any such regulations.

B. An owner may demonstrate financial responsibility by self-insurance, insurance, guaranty, surety, or any other method approved by the Board, or any combination thereof, under the terms the Board may prescribe. An owner of an aboveground storage tank may obtain an instrument of insurance, guaranty, or surety that covers multiple aboveground storage tanks. An owner of an aboveground storage tank whose financial responsibility is accepted by the Board under this subsection shall notify the Board at least 30 days before the effective date of a change, expiration, or cancellation of any instrument of insurance, guaranty, or surety.

C. Acceptance of proof of financial responsibility for an aboveground storage tank shall expire:

1. On the effective date of any change in the owner's instrument of insurance, guaranty, or surety for an aboveground storage tank or tanks; or

2. Upon the expiration or cancellation of any instrument of insurance, guaranty, or surety for an aboveground storage tank or tanks.

D. Every owner shall file an application for renewal of acceptance of proof of financial responsibility at least 30 days before the date of expiration.

E. Every owner of an aboveground storage tank shall annually demonstrate and maintain evidence of financial responsibility for containment and cleanup in accordance with regulations adopted by the Board.

F. The Board, after notice and opportunity for hearing, may revoke its acceptance of evidence of financial responsibility if it determines that:

1. Acceptance has been procured by fraud or misrepresentation; or

2. A change in circumstances has occurred that would warrant denial of acceptance of evidence of financial responsibility under this section or the requirements established by the Board pursuant to this section.

G. It is not a defense to any action brought for failure to provide acceptable evidence of financial responsibility that the person charged believed in good faith that the owner of the aboveground storage tank possessed evidence of financial responsibility accepted by the Board.

§ 62.1-44.34:9.6. Release response plans.

A. On or after January 1, 2020, no owner shall cause or permit the operation of an aboveground storage tank in the Commonwealth unless a release response plan applicable to the aboveground

182 storage tank has been filed with and approved by the Board. A plan approved by the Board may cover
183 multiple aboveground storage tanks as a single site or under the control of a single owner. If an
184 aboveground storage tank is within 300 feet of a waterway or body of water that is connected to a
185 waterway or body of water that serves as a public water supply, the owner shall provide the release
186 response plan to the nearest downstream public water supply.

187 B. Application for approval of a release response plan shall be made to the Board and shall be
188 accompanied by plans, specifications, maps, and such other relevant information as may be required, in
189 scope and detail satisfactory to the Board. A release response plan shall conform to the requirements
190 and standards determined by the Board to be necessary to ensure that the applicant can take such steps
191 as are necessary to protect environmentally sensitive areas, to respond to the threat of a release of a
192 regulated substance, and to contain, clean up, and mitigate a release of a regulated substance within
193 the shortest feasible time. Each such plan shall provide for the use of the best available technology at
194 the time the plan is submitted for approval. The applicant shall notify the Board immediately of any
195 significant change in the operation or capacity of or the type of product dealt in, stored, handled,
196 transported, or transferred in or by any aboveground storage tank covered by the plan that will
197 necessitate a change in the plan. The applicant shall update the plan periodically as required by the
198 Board, but in no event more frequently than once every 36 months. The Board, on a finding of need,
199 may require a release exercise designed to demonstrate the owner's ability to implement its release
200 response plan either before or after the plan is approved.

201 C. The Board, after notice and opportunity for a conference pursuant to § 2.2-4019, may modify its
202 approval of a release response plan if it determines that:

203 1. A change has occurred in the operation of any aboveground storage tank covered by the plan that
204 necessitates an amended or supplemented plan;

205 2. The owner's release experience or its inability to implement its plan in a regulated substance
206 release exercise demonstrates a necessity for modification; or

207 3. There has been a significant change in the best available technology since the plan was approved.

208 D. The Board, after notice and opportunity for hearing, may revoke its approval of a release
209 response plan if it determines that:

210 1. Approval was obtained by fraud or misrepresentation;

211 2. The plan cannot be implemented as approved; or

212 3. A term or condition of approval has been violated.

213 **§ 62.1-44.34:9.7. Reporting of a release.**

214 Any person releasing or causing or permitting a release from an aboveground storage tank of a
215 regulated substance that (i) enters into or upon lands, storm drain systems, or state waters within the
216 Commonwealth or (ii) reasonably may be expected to enter such waters, lands, or drain systems, and
217 any owner of an aboveground storage tank from which there is such a release, shall, immediately upon
218 learning of the release, notify the following of such release: (a) the Board; (b) the Regional Office of
219 the Department for the region in which the aboveground storage tank is located; (c) the director or
220 coordinator of emergency services appointed pursuant to § 44-146.19 for the political subdivision in
221 which the release occurs; (d) any other political subdivision reasonably expected to be affected by the
222 release; and (e) appropriate federal authorities.

223 **§ 62.1-44.34:9.8. Aboveground Storage Tank Fund.**

224 There is hereby created in the state treasury a special nonreverting fund to be known as the
225 Aboveground Storage Tank Fund, referred to in this section as "the Fund." The Fund shall be
226 established on the books of the Comptroller. All expenses, costs, civil penalties, charges, and judgments
227 recovered by or on behalf of the Board pursuant to this article and all moneys received as
228 reimbursement in accordance with applicable provisions of federal law shall be paid into the state
229 treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and
230 be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each
231 fiscal year shall not revert to the general fund but shall remain in the Fund. Moneys in the Fund shall
232 be used solely for the purposes of (i) administering the state regulatory programs authorized by this
233 article, (ii) undertaking corrective action, and (iii) other purposes as provided for by applicable
234 provisions of state and federal law. Expenditures and disbursements from the Fund shall be made by the
235 State Treasurer on warrants issued by the Comptroller upon written request signed by the Director or
236 his designee.

237 **§ 62.1-44.34:9.9. Enforcement; civil and criminal penalties.**

238 A. Upon a finding of a violation of this article or a regulation or term or condition of approval
239 issued pursuant to this article, the Board is authorized to issue a special order requiring any person to
240 cease and desist from causing or permitting such violation or requiring any person to comply with any
241 such provision, regulation, or term or condition of approval. Such special orders shall be issued only
242 after notice and an opportunity for hearing except that, if the Board finds that any release in violation
243 of this article poses a serious threat to (i) the public health, safety, or welfare or the health of animals,

fish, or botanic or aquatic life; (ii) a public water supply; or (iii) recreational, commercial, industrial, agricultural, or other reasonable uses, the Board may issue, without advance notice or hearing, an emergency special order requiring the owner of any aboveground storage tank to cease such release immediately, to implement any applicable release response plan, and to effect containment and cleanup. Such emergency special order may also require the owner to modify or cease regular operation of the aboveground storage tank, or to make such repairs as are necessary to avoid the emergency, until the Board determines that continuing regular operation of the aboveground storage tank will not pose a substantial threat of additional or continued releases. The Board shall affirm, modify, amend, or cancel any such emergency order after providing notice and opportunity for hearing to the owner charged with the violation. The notice of the hearing and the emergency order shall be issued at the same time. If an owner who has been issued such a special order or an emergency special order is not complying with the terms thereof, the Board may proceed in accordance with subsection B, and where the order is based on a finding of an imminent and substantial danger, the court shall issue an injunction compelling compliance with the emergency special order pending a hearing by the Board. If an emergency special order requires modification or cessation of operation of an aboveground storage tank, the Board shall provide an opportunity for a hearing within 48 hours of the issuance of the injunction.

B. In the event of a violation of this article or a regulation, administrative or judicial order, or term or condition of approval issued under this article, or in the event of failure to comply with a special order issued by the Board pursuant to this section, the Board is authorized to proceed by civil action to obtain an injunction of such violation, to obtain such affirmative equitable relief as is appropriate, and to recover all costs, damages, and civil penalties resulting from such violation or failure to comply. The Board shall be entitled to an award of reasonable attorney fees and costs in any action in which it is a prevailing party.

C. Any person who violates or causes or permits to be violated a provision of this article, or a regulation, administrative or judicial order, or term or condition of approval issued under this article, is subject to a civil penalty for each such violation as follows:

1. For failing to obtain approval of a release response plan as required by § 62.1-44.34:9.6, not less than \$1,000 nor more than \$50,000 for the initial violation, and \$5,000 per day for each day of violation thereafter;

2. For failing to maintain evidence of financial responsibility as required by § 62.1-44.34:9.5, not less than \$1,000 nor more than \$100,000 for the initial violation, and \$5,000 per day for each day of violation thereafter;

3. For releasing or causing or permitting a release of a regulated substance in violation of § 62.1-44.34:9.4, or owning or operating any aboveground storage tank from which such release originates, up to \$100 per gallon of regulated substance released;

4. For failing to cooperate in containment and cleanup of a release or for failing to report a release as required by § 62.1-44.34:9.7, not less than \$1,000 nor more than \$50,000 for the initial violation, and \$10,000 for each day of violation thereafter; and

5. For violating or causing or permitting to be violated any other provision of this article, or a regulation, administrative or judicial order, or term or condition of approval issued under this article, up to \$32,500 for each violation. Each day of violation of each requirement shall constitute a separate offense.

D. Civil penalties may be assessed under this article either by a court in an action brought by the Board pursuant to this section, as specified in § 62.1-44.15, or with the consent of the person charged, in a special order issued by the Board. All penalties shall be paid into the state treasury and deposited by the State Treasurer into the Aboveground Storage Tank Fund established in § 62.1-44.34:9.8. In determining the amount of any penalty, consideration shall be given to the willfulness of the violation, any history of noncompliance, the actions of the person in reporting, containing, and cleaning up any release or threat of release, the damage or injury to state waters or the impairment of their beneficial use, the cost of containment and cleanup, the nature and degree of injury to or interference with general health, welfare, and property, and the available technology for preventing, containing, reducing, or eliminating the release.

E. Any person who knowingly violates, or causes or permits to be violated, a provision of this article, or a regulation, administrative or judicial order, or term or condition of approval issued under this article is guilty of a misdemeanor punishable by confinement in jail for not more than 12 months and a fine of not more than \$100,000, either or both. Any person who knowingly or willfully makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained by this article or by administrative or judicial order issued under this article is guilty of a felony punishable by a term of imprisonment of not less than one nor more than three years and a fine of not more than \$100,000, either or both. In the case of a release of

305 *a regulated substance into or upon state waters:*

306 *1. Any person who negligently releases or negligently causes or permits such release is guilty of a*
307 *misdemeanor punishable by confinement in jail for not more than 12 months and a fine of not more*
308 *than \$50,000, either or both.*

309 *2. Any person who knowingly and willfully releases or knowingly and willfully causes or permits*
310 *such release is guilty of a felony punishable by a term of imprisonment of not less than one year nor*
311 *more than 10 years and a fine of not more than \$100,000, either or both.*

312 *F. Each day of violation of each requirement shall constitute a separate offense. In the event the*
313 *violation of this article follows a prior felony conviction under subdivision E 2, such violation shall*
314 *constitute a felony and is punishable by a term of imprisonment of not less than two years nor more*
315 *than 10 years and a fine of not more than \$200,000, either or both.*

316 *G. Upon conviction for a violation of any provision of this article, or a regulation, administrative or*
317 *judicial order, or term or condition of approval issued under this article, a defendant who is not an*
318 *individual shall be sentenced to pay a civil penalty not exceeding the greater of:*

319 *1. \$1 million; or*

320 *2. An amount that is three times the economic benefit, if any, realized by the defendant as a result of*
321 *the offense.*

322 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**
323 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot**
324 **be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter**
325 **780 of the Acts of Assembly of 2016 requires the Virginia Criminal Sentencing Commission to**
326 **assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4, the estimated amount of the**
327 **necessary appropriation cannot be determined for periods of commitment to the custody of the**
328 **Department of Juvenile Justice.**